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Access to Government Files in Selective Service Cases

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COMMENTS

ACCESS TO GOVERNMENT FILES IN SELECTIVE SERVICE CASES

We are faced today with a re-evaluation of the doctrine of privilege. Lay and professional interest has been generated by the wide publicity given to the growing use of the Fifth Amendment privilege against self-incrimination in investigations of subversive and underworld activities. Recent judicial decisions have also produced interest in the question of the governmental privileges against the disclosure of official information. This problem manifests itself in at least three ways: (1) The needs of private litigants to obtain information from governmental sources for the successful prosecution and defense of suits which either do or do not involve the Government; (2) the Government's privilege against disclosure in criminal proceedings; and (3) disclosure of information to contestants in administrative hearings. This comment will present an analysis of the rules of disclosure, as they pertain to administrative hearings under the Selective Service Act[1] in conscientious objector cases.

The cases most frequently arising under the act concern conscientious objectors. The act, as passed in 1948, contained a provision exempting from combatant duty ". . . any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[2] The determination by draft boards, both on the local and appellate level as to whether a registrant falls within the above-described category often produces perplexing problems. The ultimate question in these cases is the sincerity of the registrant,[3] and this must be determined by the board both objectively and subjectively.[4]

The procedures to be followed by applicants for securing a conscientious objector's status are enumerated by the act.[5] An applicant is required to file a request for a non-combatant classification with his local board. The

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1. 62 STAT. 22 (1948), 50 U.S.C. § 462 (1952).
2. 62 STAT. 612 (1948), 50 U.S.C. § 456 (j) (1952).
"Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code."
3. Witmer v. United States, 348 U.S. 375 (1955).
4. United States v. Wilson, 215 F.2d 443, 447 (7th Cir. 1954) (concurring opinion).
5. See *supra* note 1.

board may request him to appear before it for the purpose of ascertaining his sincerity. If the classification is thereafter granted, no further problems arise. If, however, the request is refused, the applicant has a right to appeal the refusal to an appellate board. As an ancillary proceeding of the appeal, the appellate board refers the claim to the Department of Justice for inquiry and hearing. At this hearing, the applicant may produce witnesses to testify in his behalf. In the interim, the Department has directed the Federal Bureau of Investigation to conduct a thorough investigation of the claimant's background by inquiry of anyone who may have knowledge concerning the sincerity of his convictions. The report thus compiled by the F.B.I. is utilized by the officer conducting the hearing. Upon request, the applicant is entitled to be instructed as to the general nature and character of any unfavorable evidence developed by the Department's investigation, *but he is not permitted to see the F.B.I report, nor is he informed of the names of persons interviewed by the investigators.* The Department, thereafter, makes a recommendation to the appeal board based upon its findings which will either suggest the granting or the denial of the requested classification. The act further specifies, "The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board."[6]

It would seem that adequate safeguards have been provided for registrants seeking non-combatant classifications. The numerous controversies arising over the essential elements of a fair hearing, however, make such a conclusion questionable.

The case of *Simmons v. United States*[7] is illustrative of the real problem involved in a construction of the constituencies of a fair hearing. The F.B.I. reports showed that prior to the time of application for a non-combatant status, Simmons was known as a heavy drinker and crap shooter in and around local taverns and pool halls, that he had been abusive to his wife, and had received very little formal religious training. He had impressed the hearing officer as sincere, but since his religious activities were coincident with pressing draft possibilities, a 1-A classification was recommended by the Department of Justice.[8]

The applicant in the aforementioned case was not given even the resumé of the F.B.I. report to refute the unfavorable evidence adduced against him. The Court reversed his conviction for violation of the act for failure to report for induction on that factor alone. The rationale of this decision is, however, subject to question. Even if a resumé of the report had been furnished the applicant, he would still have been deprived of the right to confront those witnesses giving unfavorable evidence about him to investigative

6. *Ibid.*
7. 348 U.S. 397 (1955).
8. *Id.* at 400.

officers with an opportunity to cross-examine them as to the incidents in his past which cast doubt upon the sincerity of his present convictions.

Prior to 1953, two divergent lines of reasoning developed among the federal circuits. The Second Circuit's interpretations of the requirements of fair hearing before the Department of Justice would have compelled the inclusion of the F.B.I. report in the registrant's record.

> The natural import of this provision is, I think, that the investigative report resulting from the inquiry shall be made part of the record for consideration by all directly concerned with the classification. Under the contemplated procedure the registrant has already had an opportunity before the draft board to put everything desired into the record. That being so, there would be no point to notify him to appear in the departmental hearing just to put in more evidence. Thus, by elimination, the only useful purpose of notice at that stage was to give the registrant opportunity to meet the contents of that report. And if such was the underlying purpose, the inference is required that the Act envisaged that the investigative report should be made part of the departmental report and go forward in its entirety for the appeal board to scan and evaluate.[9]

The opposite viewpoint of the requirements of Section 6(J) of the Selective Service Act[10] denied the right of the registrant to review the F.B.I. report.

> The statute granting deferment in the present case provides for an inquiry and hearing by the Department of Justice for the purpose of making a recommendation to the Appeal Board. The recommendation is not binding. The hearing was not a criminal trial. . . . The procedure under the draft law and the resulting classification of the registrant is not a judicial trial with the right to be represented by counsel and to call, examine and cross-examine witnesses.[11]

This conflict was disspelled by the Supreme Court in 1953. The majority of the Court intrepreted Section 6(J) as not requiring mandatory production of the F.B.I. report for scrutiny by applicants. Procedural requirements of due process are satisfied when the applicant is permitted to produce all relevant evidence in his behalf and at the same time is supplied with a fair resumé of any adverse evidence in the investigator's report.[12]

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9. United States v. Nugent, 200 F. 2d 46 (2d Cir. 1952), *rev'd*, 346 U.S. 1 (1953).
10. See Note 1 *supra*.
11. Imboden v. United States, 194 F. 2d 508 (6th Cir. 1952). See also Elder v. United States, 202 F. 2d 465 (9th Cir. 1953).
"If the agency inquiry following such referral is to be productive of worthwhile results it seems essential that frankness on the part of persons interviewed to be encouraged by assurance that their identity will not be divulged; and in the absence of clear intimation in the statute to the contrary the court will not assume that Congress intended these investigative reports to be made public."
12. United States v. Nugent, 346 U.S. 1 (1953).

The policy underlying the Court's decision was apparently predicated upon the national emergency existing at the time of decision. It seems both dangerous and inconsistent with former decisions to formulate broad rules applicable to future hearings based upon this factor.[13] The language of the Court is difficult to reconcile with a case decided two years earlier, but also during the Korean conflict, wherein the Court did not find a national emergency to exist and seemed greatly pre-occupied with a preservation of constitutional procedures.[14]

A constitutional justification of the procedure must be based upon the settled policy that induction of persons conscientiously opposed to war is not violative of the First Amendment guarantees of freedom of religion.[15] Once this is established it must be conceded that exemption stems from Congressional legislation,[16] rather than from any inherent constitutional right. It then follows that Congress could have provided any type of procedural requirements which it deemed proper or could have dispensed with them entirely. Since, however, hearings have been provided by the act, why have the Court decisions resulted in a narrow construction? This stems from the weight given to the probable results from a more liberal interpretation, e.g., a hampering of the war effort.

The most important factors relied on in dissenting opinions in the conscientious objector cases is the denial of the right of confrontation of witnesses. Although it may be contended that such a right is applicable only to criminal proceedings, the inability to adequately refute the adverse evidence at the hearing may ultimately result in criminal action,[17] since the religious convictions of sincere applicants precludes their reporting for induction. In the trial court the burden is upon the applicant to prove the induction order void. In the case of a Jehovah's Witness, "the registrant is

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13. *Id.* at 10. "It is especially difficult when these procedures must be geared to meet the imperative needs of mobilization and national vigilance — when there is no time for "litigious interruptions." But see the dissenting opinion of Justice Murphy in Falbo v. United States, 320 U.S. 549, 557 (1944). "Experience demonstrates that in time of war individual liberties cannot always be entrusted safely to uncontrolled administrative discretion."

14. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

15. U. S. CONST. amend. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

16. George v. United States, 196 F. 2d 445 (9th Cir. 1952).
This case contains an excellent summary of the history of selective service legislation and the problems of freedom of religion arising thereunder.

17. 62 STAT. 622 (1948), 50 U. S. C. § 462 (a) (1952).
"Any . . . person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the exceptions of this title . . . . or rules, regulations, or directions made pursuant to this title . . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment . . . ."

required to prove that he is a regular or duly ordained minister of religion."[18] Yet, interpretations of the statutory procedure have proceeded on the assumption that it is not the function of the auxiliary process of Department of Justice review to provide a full-scale trial for each appealing registrant based upon the testimony obtained in its pre-hearing investigation.[19] It is thus apparent, that confrontation of adverse witnesses upon whose testimony the Government initially relied in denying the applicant's claim can never occur during any course of the proceedings either administratively or judicially. Identities of the witnesses are contained only in the F.B.I. report which is inaccessible to the applicant at the hearing stage. For successful prosecution, this report need not be introduced into evidence at the judicial level.[20] Discovery under the Federal Rules of Criminal Procedure[21] does not entitle the defendant to compel the production of the investigative records and reports since the defendant is not entitled to the names of witnesses or informers which appear therein.[22] Only after a witness is used by the prosecution, has the defendant the right to compel the production of the entire statements of the witness for impeachment purposes.[23] The precariousness of the applicant's position is evident. The Government need never produce a witness at the trial, nor must any evidence of the insincerity of the applicant's convictions be made an issue. The Government must only prove the failure of the applicant to report for induction to establish the defendant's violation of the statute. The defendant may only produce character witness to testify as to his religious beliefs to prove the induction order void. These witnesses, however, are subject to cross-examination by the Government. This appears to be an unjustifiable burden to place upon an applicant. "Without the identity of the informer the person investigated or accused stands helpless."[24]

There is a public interest in not revealing the identity of sources of information so as to encourage free communication of information to the

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18. Wells v. United States, 158 F. 2d 932 (5th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947). See also United States v. Tomlinson, 94 F. Supp. 854, 856 (D. C. Pa. 1950). "The Government proved . . . that the defendant had been properly processed for induction, that he had been ordered to report for induction and had failed to present himself. This proof established all of the elements necessary to establish the Government's case and put the defendant to his defense."

19. See note 12 *supra*.

20. Note 18 *supra*.

21. FED. R. CRIM. P. 16, 17.

22. BARRON, FEDERAL PRACTICE AND PROCEDURE 126, note 12, and cases cited therein. See also United States v. Wider, 117 F. Supp. 484 (E. D. N. Y. 1954).

23. 18 U.S.C. § 3500 (Supp. IV, 1957). "Demands for production of statements and reports of witnesses. (a) In any criminal prosecution brought by the United States no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness . . . to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

24. United States v. Nugent, 346 U.S. 1, 14 (1953) (dissenting opinion).

Government.[25] This free-flow of communication can be created only by holding out exemption from a compulsory disclosure of the informant's identity.[26] This privilege is well-established and its soundness cannot be questioned, but it is subject to certain limitations inherent in its logic and its reason. The privilege applies only to the *identity* of the informant, not to the contents of his statements, as such, for, by hypothesis, the contents of the communication are to be used and published in the course of prosecution.[27] A fair resumé of the contents of the F.B.I. report appears therefore, to be consistent with this requirement.[28]

The task confronting the Court in *United States v. Nugent*[29] was to properly weigh the two alternatives of due process and the preservation of the informant's privilege. At the time of that opinion, the latter was deemed to be the more important, and the actual F.B.I. reports were not thereafter open to scrutiny by applicants.

Much public and official criticism was recently leveled at the Supreme Court for its decision in *Jencks v. United States*.[30] Misinterpretations of the opinion led many to believe that the informant's privilege had been completely abandoned by the courts and that governmental files and records would be available where they had not been so in the past.[31] At least one court allowed the issuance of a subpoena duces tecum for the production of the F.B.I. report in a conscientious objector case basing its opinion on the *Jencks* rule. The court felt that if *Nugent* were to arise again, it would be overruled by the Supreme Court.[32]. There can be no doubt, however, that the judge misconstrued the *Jencks* rule and should not have allowed the issuance of the subpoena duces tecum based upon the existing applicable law,[33] since *Jencks* only requires the production of investigative reports for impeachment when the government uses oral testimony at its option, and then only in criminal proceedings.

Before any judicial determination can be achieved of the complex problems arising from the application or departure from the doctrine of government privilege in conscientious objector cases, three factors must be resolved: (1) Due process to the applicant; (2) the necessity for maintaining the

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25. Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73 (1949).
26. 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940). See also note 11 *supra*.
27. *Ibid.* See also Pihl v. Morris, 319 Mass. 577, 66 N. E. 804 (1946).
28. United States v. Dal Santo, 205 F. 2d 429 (7th Cir. 1953).
29. See note 24 *supra*.
30. 353 U.S. 657 (1957).
31. S. REP. No. 981, 85th Cong., 1st Sess. ... (1957). The report contains an interesting discussion of the misinterpretation and misapplication of the Jencks doctrine. To eradicate the possibility of future misconceptions as to the correct holding of the case, Congress enacted a statute codifying the rule. See note 23 *supra*.
32. United States v. Jacobson, 154 F. Supp. 103 (W. D. Wash. 1957).
33. See United States v. Carr, 21 F. R. D. 7 (S. D. Cal. 1957); United States v. Palermo, 21 F. R. D. 11 (S. D. N. Y. 1957).

informant's privilege; and (3) the requirements of an efficient selective service system.

It is obvious that the federal courts have become "due process conscious" as evidenced by numerous recent decisions. The question of whether this trend will be extended to embrace the requirements of a fair hearing under the Selective Service Act is within the realm of conjecture. Congress has provided a mere skeleton to which the courts may add whatever components they deem desirable.

The dilemma of the sincere applicant, under the procedure as it presently exists, must certainly be apparent to the courts. Either the applicant can impress the investigatory board as sincere through an incomplete process which denies him the right to utilize the F.B.I. report, or he can face criminal charges and at the judicial level attempt to persuade a jury of his convictions. Why should it be necessary, however, to resort to this prolonged process when the entire matter could be settled at the administrative level and probably ensure him more fairness, since he need not resort to the cumbersome rules of formal judicial procedure?

The perplexity of this situation must be weighed against the necessities of maintaining the informant's privilege against disclosure, for without it, the Government will be hampered by an inability to secure sufficient information to carry out its multitudinous functions. People will be reluctant to offer information to any investigatory agency when a possibility exists that their identities will be divulged.

Conceding the reasoning of the Court in *Nugent*, it may be necessary in time of war to require a speedy and efficient selective service system which may preclude the cumbersome process of cross examination of adverse witnesses, yet is this argument so persuasive as to prevent full disclosure of the F.B.I. report?[34] Especially today, in a time of comparative peace, when the courts are apparently liberalizing the formerly strict rules applicable to governmental privileges,[35] it would appear that more fairness could be ensured by permitting full disclosure of the reports.

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34. 346 U.S. at 12-13.
"Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake and where prison may be the alternative to an abandonment of conscience. The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies."

35. United States v. Reynolds, 345 U.S. 1 (1952). See also note 30 *supra*. Both cases represent a liberality in judicial approach to the formerly sacrosanct privilege accorded the Government against disclosure of official information.